

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

|                                        |                               |
|----------------------------------------|-------------------------------|
| IN THE MATTER OF APPLICATION )         |                               |
| FOR PERMIT NO. 15-7367 IN THE NAME )   | <b>ORDER DENYING PETITION</b> |
| <u>OF JEFF ALDER dba ALDER RANCH )</u> | <b>FOR RECONSIDERATION</b>    |

On May 24, 2013, Jeff Alder dba Alder Ranch filed an application with the Idaho Department of Water Resources ("Department") seeking a permit to divert 5.00 cfs from ground water for the irrigation of 264 acres near Malad, Idaho. The application was advertised to the public beginning on June 6, 2013. Protests were filed against the application by Stephen D. Werk, Matthew and Sarah Warren, and Arthur and Lorrie Martinez.

The Department conducted an initial pre-hearing conference on April 30, 2014 and a second pre-hearing conference on June 4, 2014. At the second conference, the protestants agreed to withdraw their protests and did so by signing withdrawal of protest forms. The withdrawals of protest were conditioned on certain language being added to the permit.

The Department issued Permit 15-7367 on June 5, 2014. The permit included a number of limiting conditions. On June 12, 2014, Stephen Werk filed a petition for reconsideration with the Department asking for certain permit conditions to be amended and for additional conditions to be added to the permit. An Amended Permit 15-7367 was issued by the Department on June 16, 2014.

On June 23, 2014, protestant Stephen Werk filed a letter with the Department which is considered a second petition for reconsideration ("Second Petition"). The Second Petition asked for three additional limiting conditions to be included on the permit. This order addresses the conditional withdrawals of protest filed by the protestants and the additional conditions requested in the Second Petition.

Application for Permit 15-7367 included the following elements:

Point of Diversion: SWNE, Section 3, T15S, R36E (existing artesian well)  
Place of Use: 264 acres in Section 3, T15S, R36E  
Purpose of Use: Irrigation from April 1 to November 1  
Diversion Rate: 5.00 cfs

The Withdrawal of Protest signed by Stephen Werk on June 4, 2014 stated the following: "My withdrawal is conditioned on the following: [1] Permit limited to 160 ac. ft. [2] Must have measuring device on well by 2015 [3] Must use[ ] all surface water first, no Deep Creek shares can be transferred or used on any other property other than the 264 acres."

The Withdrawal of Protest signed by Sarah Warren on behalf of Sarah and Matthew Warren on June 4, 2014 stated the following: "My withdrawal is conditioned on the following: 1) Surface

water used first and not transferred elsewhere. Only on the 264. 2) Limited to 160 acre feet. 3) Measuring device installed by 2015.”

The Withdrawal of Protest signed by Arthur Martinez on behalf of Arthur and Lorrie Martinez on June 4, 2014 stated the following: 1) Surface water used first and not transferred elsewhere. 2) Limited to 160 acre feet. 3) Measuring device installed by 2015.”

Amended Permit 15-7367 carries an annual diversion volume limit of 160 acre-feet. Amended Permit 15-7367 also includes the following conditions:

3. Prior to the diversion and use of water under this right in the 2015 irrigation season, the right holder shall install and maintain an acceptable flow meter measuring device at the authorized point of diversion, in accordance with Department specifications.

4. The right holder shall make full beneficial use of all Deep Creek water available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right to those times when the Deep Creek water appurtenant to the 264 acres described above has been fully exhausted.

5. The right holder uses water from Deep Creek Irrigation Co. on the 264 acres described above. If the Deep Creek Irrigation Co. shares appurtenant to the place of use are abandoned, forfeited, sold, transferred, leased or used on any other place of use, this right to divert ground water shall not be used and the Department will have cause to cancel this water right.

According to the plain language of the withdrawals of protest signed by Werk, Warren, and Martinez, the terms of withdrawal have been fully satisfied by the elements and conditions included on the Amended Permit. Additional limitations on the permit were not identified in the withdrawals.

The Second Petition filed by Werk requested that three additional conditions be included on the permit: 1) The permit, in combination with other rights on the property (the existing surface water canal shares) be limited to 2.4 acre-feet per acre per year; 2) The flow meter installed at the point of diversion will be read twice per year by the Department; and 3) If Alders ever divert more than 160 acre-feet per year from the ground water well, permit 15-7367 would be automatically cancelled. Werk asserts that these terms were part of the agreement to withdraw protests.

The Department should not add a limit of 2.4 acre-feet per acre to the permit. The diversion volume already included on the permit (160 acre-feet) was calculated based on an irrigation demand of 2.4 acre-feet per acre. In a drought year, if Alder were to divert 160 acre-feet of water in combination with the water expected to be available from Deep Creek Irrigation Co., he would be able to apply, on average, 2.4 acre-feet per acre to the permitted place of use. During the

second pre-hearing conference, the parties did not discuss adding a limit of 2.4 acre-feet per acre to the water right. In fact, the parties acknowledged that Alder would have the ability to dry up acres in a drought year to provide a more reliable water supply for the remaining irrigated acres. To impose a 2.4 acre-foot per acre limit would unreasonably restrict Alder in the management of his water supplies.

The Department should not add a condition requiring Department monitoring of the flow meter measuring device. This permit represents one of hundreds of ground water irrigation rights within Basin 15 (Malad River basin). The Department does not have the staff to regularly monitor individual water rights. Idaho law contemplates that monitoring and measurement of water rights will be conducted through water districts and water measurement districts. (See Chapter 6 and Chapter 51 of Title 42, Idaho Code.) Monitoring this single well, even if only twice per year, constitutes an unreasonable burden on the Department when viewed in the context of the thousands of irrigation wells existing in southeastern Idaho. If the protestants want the wells in Basin 15 to be monitored they should initiate the process of creating a water district.

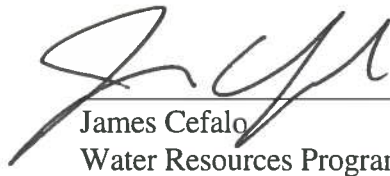
Finally, the Department should not add a condition automatically cancelling the permit if the 160 acre-foot limit is exceeded. Diversion in excess of existing water rights does not normally result in the cancellation of existing, valid water right. Rather illegal water use is addressed through the enforcement procedures outlined in Idaho Code §§ 42-351 and 42-1701B. The Department should generally avoid creating new enforcement procedures through permit conditions.

Because the terms listed on the withdrawal of protests have been fully satisfied and because the additional limits proposed by protestant Stephen Werk should not be added to the permit for the reasons stated above, the Second Petition should be denied

### ORDER

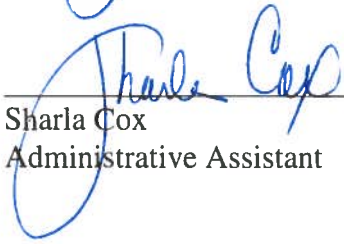
IT IS HEREBY ORDERED that the second petition for reconsideration filed by protestant Stephen Werk is DENIED. The protests filed in this contested case are considered withdrawn and Amended Permit 15-7367 remains effective as approved.

Dated this 24<sup>th</sup> day of June, 2014.

  
James Cefalo  
Water Resources Program Manager

**CERTIFICATE OF MAILING**

I hereby certify that on the 24<sup>th</sup> day of June 2014, I mailed a true and correct copy, certified and postage prepaid, of the foregoing ORDER DENYING PETITION FOR RECONSIDERATION to the person(s) listed below:

  
\_\_\_\_\_  
Sharla Cox  
Administrative Assistant

**US MAIL**

**RE: Order Denying Petition for Reconsideration – Permit 15-7367**

**Jeff Alder  
2154 South Old Highway 191  
Malad City, ID 83252**

**Sarah Warren  
341 West 400 North  
Malad City, ID 83252**

**Stephen Werk  
3390 West Lone Mountain Rd.  
North Las Vegas, NV 89031**

**Stephen Werk  
4090 South Old Highway 191  
Malad City, ID 83252**

**Arthur Martinez  
1979 Cameron Drive  
West Haven, UT 84401**

**Arthur and Lorrie Martinez  
300 South 5800 West  
Pleasant View, ID 83252**

## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

### **REQUEST FOR HEARING**

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

## **CERTIFICATE OF SERVICE**

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

## **FINAL ORDER**

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

## **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.